The Central Law Journal.

ST. LOUIS, JANUARY 3, 1890.

WITH this issue, the JOURNAL starts upon its thirtieth volume. It may not be out of place, at this time, to say a few words on our own account. And in the first place, we desire to thank our subscribers for the repeated evidences of their interest in and appreciation of our efforts. It is gratifying to us to know that a fair proportion of our readers have been with us since the first issue of the JOURNAL, January 1, 1874, sixteen years ago, and though during that period we have undoubtedly made as many mistakes as the remainder of human kind, we are glad to be able to believe that our friends have been equally generous in overlooking our faults and shortcomings.

Though not disposed to exaggerate our value and importance in the legal world, we are bound to believe that, to some extent at least, we have filled the measure of satisfaction established for us, for the fact is that never in our history have we had so large a list of subscribers. It may be of interest to our friends to know that we have the largest circulation of any law journal in this country, and we have reason to believe that there is no law magazine in any country, which in this regard approaches ours.

It was the prediction of many, and it is still the belief of a few, that the system of reporters would crowd out the law journals proper. And though, in most instances, the anticipated result followed, yet the demand, on the part of the bar, for something outside the mere dry report of cases, gave renewed strength to a few of the established legal periodicals. And this has been eminently the case with us. We are free to say that our prosperity has never been so great as since the appearance of the reporter system. And this is as it should be. It is difficult for the most diligent student to keep pace with the ever increasing mass of opinions rendered from time to time, in all the courts, and for the busy practitioner, such a thing is impossible. We conceive that our mission is, in succinct and readable shape, to inform and enlighten, to call attention to what the courts are doing and saying, and, so far as we are capable, give direction and aim to legal thought and analysis. That we are striving to accomplish these objects, and to make the JOURNAL invaluable to our readers, we beg the latter to believe. Whether we succeed in our aspirations is a question which we are obliged to leave to them to decide.

OUR readers have already been made acquainted with the provisions of the anti-trust legislation, adopted by the State of Missouri. That legislation, in brief, prohibited corporations, partnerships or individuals from entering into any pool, trust or combination intended to fix or limit the price of any article or commodity, and imposed penalties for the violation of the prohibition. The Secretary of State was charged with the duty of enforcing the provisions of the act respecting the revocation of charters where the corporations in response to a request by him neglected or refused to file affidavits declaring their non-connection with pools, trusts or combinations of the kind forbidden by the law. A large number of corporations have failed to file affidavits in response to the call of the secretary, and he has given notice of the revocation of the charters of the domestic corporations, and, in the case of the foreign companies doing business in the State, he has given notice of their failure to comply with the law, the penalty in the latter case being a revocation of the charters after thirty days' notice.

It is already to be seen that the action of the State in declaring the annulment of the charters of these corporations will be vigorously resisted. The law may be attacked upon two grounds, viz: that it violates property rights guaranteed by the constitution, and that it infringes on the domain of congress in attempting to regulate interstate commerce. Even if it should be held that constitutional property rights are not infringed by such legislation, considered by itself, the law may be held void as affecting commerce between the States. To illustrate, one of the foreign corporations to be affected by the enforcement of the law is the Western Union Telegraph Company, which is not a Missouri corporation, and whose business is

largely interstate business, and to that extent, as the Supreme Court of the United States has held, forms a part of interstate commerce. In so far as the business of that corporation is of the latter character, it is beyond the jurisdiction of any State. In such case the essential question would be not as to the nature of the legislation considered by itself, but as to the competence of the State to enact it. If the provisions of the act should be held to be regulations affecting interstate commerce, of course the legislation would fail on that ground.

In this connection, the recent decision of the Supreme Court of Illinois, in People v. Chicago Gas Trust Co., has been construed and heralded as another blow at "trusts," but nothing could be further from the fact. The impression undoubtedly gained currency through the use of the technical term in the name of the corporation affected. As a matter of fact the "Chicago Gas Trust Co." is a corporation, created under the laws of the State of Illinois, for the purpose of acquiring works for the sale and manufacture of gas and electricity, and the decision of the court was that it had no power to purchase and hold the stock of other gas companies as incidental to its main object. The doctrine of this case is not new, nor has it originated with the creation of "trusts." When a corporation diverts its statutory power from the end for which it was granted and employs it to acquire stock in other corporations, or indeed in any direction not fairly authorized by its charter, contrary to the public policy of the State, the latter may undoubtedly in its sovereign capacity revoke the grant.

There has been much complaint made of the Cronin jury, on account of their compromise verdict, and considerable interest has attached to the unofficial reports of their doings while deliberating thereupon. It seems that a good deal of bad blood was engendered by the action of one of the jurymen who stubbornly resisted all attempts to find for conviction, in the face of overwhelming evidence, and who had given evidence of unreasonable bias which should have disqualified him. From all accounts the proceedings of the jury were bellicose in their nature and to such an extent that the juror mentioned above, was obliged to call upon the bailiff for protection from his fellows. This condition of things was in striking contrast to the jury in a recent Louisiana case — State v. Demareste—who, while deliberating as to the guilt of one charged with murder, got drunk in a body, made a great deal of noise and sang as they ascended the stairs to their sleeping room "we are climbing up the golden stairs." It is unnecessary to state that the court very properly reversed the conviction founded upon their verdict.

NOTES OF RECENT DECISIONS.

The admissibility, in evidence in an action for negligence against a railroad company, of reports of officers of the road to the manager detailing the facts connected with the accident and fixing the responsibility therefor was considered by the Supreme Court of Georgia in Carroll v. East Tenn. V. & G. Ry. Co., 10 S. E. Rep. 163. The court in excluding such testimony says:

By a standing rule of the company, as may be inferred, reports by its officers and employees were to be made to it of the facts and circumstances attending accidents. This accident occurred on the 8th of February, and on the the 18th of that month the superintendent prepared a report to the general manager on the subject. On the following day, the 19th, a report by the conductor, supported by his affidavit and that of several others, embracing engineer, fireman, flagman, brakeman, and another conductor, the plaintiff himself being one of the affiants, was made, and, as we infer, was transmitted through the superintendent, and along with his report, to the general manager. The report of the conductor cast the whole blame on the engineer, treating all the rest of the crew as faultless. These documents were admitted in evidence on behalf of the plaintiff, over the defendant's objection. Having had their origin many days after the happening of the events to which they related, they were no part of the *res gertæ* of the cause of action on trial, but were mere narrative touching past occurrences. Consequently they do not fall within the principal of the case cited from 33 N. W. Rep. 867, (Keyser v. Railway Co., decided by the Supreme Court of Michigan in June, 1887). Mechem, Ag. §§ 714, 715; Code § 2206. Nor is Carlton v. Railroad Co., 7 S. E. Rep. 623 (October term, 1888), a decision upon the question of their admissibility. As far as that case goes is to suggest that they were not confidential communications, but, really, even that question was not involved so as to render a decision of it necessary. Upon principle, we think it clear that these reports were inadmissible; and several authorities which we deem sound are to that effect. In Langhorn v. Allnutt, 4 Taunt. 511, it was held that letters of an agent to a principal, in which he is rendering him an ac

count of the transactions he has performed for him, are not admissible in evidence against the principal. A like ruling was made in Reyner v. Pearson, *Id.* 662. See, also, Kahl v. Jansen, *Id.* 565, "An official statement or report received by the corporation or board from one acting as officer, and accepted and adopted by them, is competent evidence against the corporation, and those bound by its acts, without further proof of the appointment of the officer; but a report to a corporation or board is not made admissible in evidence against it by the mere fact that it was received and 'accepted' by it, except for the purpose of charging it with notice of the contents." Abb. Tr. Ev. p. 51, § 62. "An admission by a corporation of a fact or liability, duly and properly made, is, of course, evidence against it; but a municipal corporation, by accepting, that is, by receiving, the report of a committee of inquiry, does not admit the truth of the facts stated therein; and such a report, though accepted by the vote of the corporation is not admissible in evidence against it." 1 Dill. Mun. Corp. (3d Ed.) § 305, (earlier editions, § 242).

The case of Railroad Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. Rep. 1, was cited and relied on in behalf of the plaintiff. The opinion was delivered by Mr. Justice Gray, who devotes but a single sentence to the question, merely saying: "The reports made by the superintendent to the borad of directors in the course of his official duty were competent evidence, as against the corporation, of the condition of the road." Looking to the statement of facts prefixed to that opinion, we find it represented that "the plaintiff offered in evidence two printed reports made by the superintendent of the road to the board of directors,—one in 1877, which stated that, in the portion of the road where the heaviest traffic was done, there were about 35 miles of iron that had been run over for more than 25 years, and required the closest attention to prevent accidents; and the other, made in 1880, stated that there were 25 miles of track made of iron 42 years in service, and now almost entirely worn out. The defendant objected to the admission of these reports because they were not sworn to under examination in court; because they had no reference to the place of the accident, but only to the general condition of the rails; because they could not bind the defendant as admissions; and because the information of the superintendent as to the condition of the road was derived, in part from the reports of subordinates. But the court overruled the objections, and admitted the reports in evidence." According to this statement, the reports were printed, and in all probability had been promulgated by the company as official documents adopted by and proceeding from it. If so, this would make them utterances of, and therefore admissions by, the company. Moreover, had they not been printed and promulgated, they would have tended to show that the company had notice of the condition of its road previously to the occurrence of the injury in controversy, and would have been admissible to charge the company with such notice, under the rule as above quoted from Abbott. The reports now in question do not relate to the condition of the road, and have no bearing upon any question, of notice to the company of any fact whatsoever prior to the injury; their contents consisting wholly of historical matter touching past conduct, and its consequences. So far as appears, the truth of the reports was never in any way passed upon, adopted, or affirmed by the corporation; nor were the documents printed, issued, or circulated by it as true. It surely cannot be sound law to hold that by collecting information whether, under general rules or special orders, and whether from its own officers, agents, and employees, or others, a corporation acquires and takes such information at the peril of having it treated as its own admissions, should litigation subsequently arise touching the subject-matter. As well might it be considered that any and every suitor who sends out agents to discover witnesses and collect facts touching his rights or duties regarding a pending or prospective lawsuit is to be met at the trial with the communications made by or to such agents as admissions made by himself. Can it be possible that a collector of historical materials is to be held responsible for the truth or accuracy of them, without himself having indorsed or promulgated them as true?

The case of Krogg v. Railroad Co., 77 Ga. 202, was also cited and relied upon. The evidence held competent in that case consisted of declarations made by the general manager, some of them relating to the condition of the track, and some to the cause of the accident, which he attributed to too much elevation of the superstructure on one of the curves of the road. It would seem that the admissibility of this evidence was put by the court partly on the ground that the general manager represented the corporation in making the statements, which, by the way, were not made as reports of the company, or any superior officer, but as mere oral declarations, partly upon the ground that they were embraced in the *res gestæ*, and partly upon the ground that they showed his knowledge, and therefore the knowledge of the corporation, as to the improper construction and condition of the road before the accident. We need not comment upon this case further than to observe that its facts are so different from those of the case in hand that the one cannot be a precedent for the other. An officer so high in power and position, and so comprehensive in his duties, as is the general manager of a railroad, might possibly be competant to affect the company by his admissions or declarations when like admissions or declarations proceeding from subordinate officers or agents, or from mere servants and employees, of the company, would be attended with no such admissible quality. Certainly, this distinction could well be drawn where the declarations of subordinates, etc., were made to the company some time after the transaction to which they relate, and were elicited for the sole purpose of its own information, and for use in guiding its own conduct.

THE effect of a sale, by an insolvent corporation, of its property to one of its directors, in satisfaction of a pre-existing debt was considered by the Supreme Court of Illinois in Beach v. Miller, 22 N. E. Rep. 464, and it was held that such a sale, though voidable in equity, does not render the property subject to levy at the suit of the corporation's creditors, and that, though made without an order of the board of directors, it is ratified by the company's receiving and canceling the notes in payment of which it was made. The court says:

But appellants rely upon another ground to defeat the sale—that it was void for the reason that Miller was at the time a director of the corporation, and

could not contract with it. This proposition is discussed in the argument under several distinct heads, and various authorities have been cited in its support. There is a conflict of authority on this question; but, on the general proposition whether a director may deal with the corporation, we think the weight of authority is that he may. This court so held in Merrick v. Coal Co., 61 Ill. 479, and in Harts v. Brown, 77 Ill. 226. The Supreme Court of the United States hold the same doctrine. In Oil Co. v. Marbury, 91 U. S. 587, it is said: "It is very true that, as a stockholder, in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent." See, also, the following authorities, where the same doctrine is announced: Ang. & A. Corp. § 233; Whitwell v. Warner, 20 Vt. 425; Smith v. Lansing, 22 N. Y. 526; City of St. Louis v. Alexander, 23 Mo. 483. While a corporation remains solvent, we perceive no reason why a director, with the knowledge of the stockholders, may not deal with the corporation, loan it money, take security, or buy property of it, in like manner as a stranger; but whether a director in an insolvent corporation may purchase the assets in payment of a debt, and thus secure a preference over other creditors, presents a different question. So long as a corporation remains solvent, its directors are agents or trustees for the shareholders. They owe no duty or obligations to others. But the moment a corporation becomes insolvent its directors occupy a different relation. The assets of the corporation must then be regarded as a trust fund for the payment of all its creditors, and the directors occupy the position of trustees, and, a fiduciary relation then existing, they may with propriety be prohibited from purchasing the trust property.

The relation that directors occupy to the property of a corporation is well stated in Odgen v. Murray, 39 N. Y. 202, * * * Drury v. Cross, 7 Wall. 299. * * * Curran v. State, 15 How. 307; Richard v. Insurance Co., 23 N. H. 263; Morawetz on Corporations, § 579; Haywood v. Lumber Co., 64 Wis. 639. * * * The language used in Merrick v. Coal Co., *supra*, is broad enough to authorize a director of an insolvent corporation to deal with the corporation. But the power of a director to purchase property of or deal with an insolvent corporation did not arise in that case, and what was said was mere *obiter dictum*. There the Peru Coal Company, a corporation executed certain notes payable to the Michigan Car Company, and also drew certain drafts in favor of the company. These notes and drafts were purchased by Merrick, who was an officer of the corporation, with his own funds, and he brought an action on the notes and drafts, and the only question was whether he was entitled to recover, and the court properly held he might recover upon the notes and drafts. Harts v. Brown, 77 Ill. 226, is another case where expressions may be found similar to those used in the Merrick Case, which were not justified by the questions presented for decision. That was a bill brought by stockholders to vacate a sale under a trust-deed given by the company to secure the payment of certain bonds issued by the company, and sold to one of the directors. The question arose whether the company had the power to execute a trust-deed, and whether it could loan money of a director. It was held that the charter conferred power to borrow money, and secure it by mortgage or deed of trust, and that the board of directors might borrow money of one of its members. The question before the court was properly decided, but the expression that a director may trade with, borrow from, or loan money to, the company of which he is a member, on the same terms, and in like manner, as other persons, was not authorized by the case made by the record. After a careful examination of the authorities, we are inclined to the opinion that, if this corporation was insolvent at the time of the sale, Miller, who was a director, could not lawfully purchase the property in satisfaction of his own debt, to the exclusion of other creditors, but he took the property charged with the trust in favor of other creditors, which may be enforced in an appropriate action. Miller, being a creditor, would doubtless be entitled to share with the other creditors in the property, but he could not appropriate the entire amount to the payment of his own debt. This, however, conferred no right upon appellants to seize the property and sell it in satisfaction of the debt of Blatchford & Co., as creditors of the corporation. They occupied no better position than Miller. It may be, and no doubt is, true, that if Blatchford & Co. had levied on the property while in the hands of the corporation, before the sale to Miller, they would, under such circumstances, have been entitled to hold it; but after the sale and delivery to Miller they had no such right. The property had passed beyond the reach of their execution. It had passed into Miller's hands, charged with a trust which a court of equity might enforce in favor of all the creditors of the corporation, or such as might invoke the aid of that court.

THE validity of a mortgage upon ungrown crops was exhaustively considered by the Supreme Court of Dakota, in Grand Forks National Bank v. Minneapolis & N. Elevator Co., 43 N. W. Rep. 806. It was there held that, under the well settled rule of equity, as adopted by Comp. Laws Dak. § 4328, which provides that an agreement may be made to create a lien on property not yet in existence, in which case the lien attaches when the party agreeing to give it acquires an interest in the property, a mortgage on crops not yet planted is valid. Such a mortgage is valid against a *bona fide* purchaser for value if recorded when given, and need not be again filed for record after the crops come into existence. The court says:

It is conceded by the parties that the crop of wheat sought to be mortgaged had not been sown at the time of the making or the filing of the chattel mortgage in question; and it is further conceded that the defendant had no other or further notice of plaintiff's claim

to the property than that conveyed by the filing of the mortgage on March 5, 1887; so that the simple question presented to the court is, was this mortgage upon crops to be grown upon the land of the mortgagor, made and filed prior to the planting thereof, but remaining on file thereafter, valid, as against this defendant, or, in other words, did the record of such a mortgage impart notice to him? At common law the mortgage conveyed the title; and, as a mere expectancy or property not *in esse* could not be conveyed, it could not be mortgaged, and the mortgage of goods not then owned by the mortgagor was held not to cover such property, though subsequently acquired by him. Jones v. Richardson, 10 Metc. 481; Otis v. Sill, 8 Barb. 102. This rule of the common law, which is still adhered to, became subject to many exceptions, and, on the theory of potential existence, the chattel mortgage became extended to a large class of cases in which the property had no actual or certain future existence—such as the wool to be grown from certain sheep, the butter to be manufactured from the milk of certain cows, the grain to be harvested from growing crops, and even, in some cases, the crops to be sown and harvested on certain described lands. Van Hoozer v. Cory, 34 Barb. 9, 12; Conderman v. Smith, 41 Barb. 404; Arques v. Wasson, 51 Cal. 620; Robinson v. Ezzell, 72 N. C. 231; McCaffrey v. Woodin, 65 N. Y. 459. These cases proceeded upon the theory that a person having a present ownership of the means of producing was the owner of the future product. Much skill and learning is displayed in the decisions of the courts in determining whether the facts of the given case bring it within the rule. Many other exceptions grew up in which the strictness of the common law rule became much modified; and, as the chattel mortgage came more and more into use in the commercial world by force of statutes and modern decisions of the courts, the harshness of the rule has greatly disappeared. The maxim of Lord Bacon, that "although a disposition of after-acquired property is altogether inoperative, yet such disposition may be considered as a declaration precedent, which derives its effect from some new act of the party after the property is acquired," has been applied by the courts in its fullest effect to mortgages at law. Courts of law have been disposed to treat such mortgages as declarations in regard to future interests, and valid as such between the parties. The earlier cases required some affirmative act on the part of the person to be affected thereby after the happening of the event upon which the contract was based, and generally such new act to ratify the original contract must have been in furtherance of it, and with an apparent intention that the original agreement should be treated as then in force. Jones v. Richardson, 10 Metc. 481; Head v. Goodwin, 37 Me. 181. Later, the courts were inclined to allow that the declaration of the mortgage, permitting the mortgagee to take possession of the property upon condition broken, could be enforced without any assent of the mortgagor after default, and that upon possession so taken by the mortgagee the lien of the mortgage attached, and the contract became valid as one of pledge. This doctrine proceeded upon the theory that the agreement contained in the mortgage was a continuing one until it was canceled or revoked by the mortgagor, and that the mortgagee, acting lawfully under such license, obtained a valid lien as pledgee as soon as he reduced the property to possession; and some of the cases have gone so far as to intimate that such power may be irrevocable. Wood v. Leadbitter, 13 Mees. & W. 838; Wood v. Manley, 11 Adol. & E. 34; McCaffrey v. Woodin, 65 N. Y. 459.

In equity, however, a different rule has always obtained from the one at law. The title to the mortgaged property never passed to the mortgagee, but the interest of the mortgagee was considered as a mere lien—an equitable interest—which would prevail over creditors and subsequent claimants, although the mortgagee had done no act to reduce the property to possession, and though he had done no new act to perfect the lien after the property had been acquired or came into existence; the theory of this doctrine being that the mortgage upon future property is a continuing agreement, while attaches to the property immediately upon its coming into existence, and adheres to it for the benefit of the mortgagee, in accordance with the familiar principle that "equity considers that done which ought to be done." This equitable doctrine as to mortgages comes to us from the civil law, which declares: "Not only goods in present possession, but even goods in reversion, are comprehended under a general pawn or *hypotheque*—as grain in the ground, a ship to be built, with the timber pledged—if there be a clause inserted to comprehend it. An *hypotheque* may be an assurance of a thing to be delivered hereafter." Dom. Civil Law, bk. 3, tit. 1, § 1; Ayl. Pand. bk. 4, tit. 18. The doctrine was early adopted by our American courts. In Mitchell v. Winslow, 2 Story, 644, Judge Story says: "It seems to me a clear result of all the authorities that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy." In that case a mortgage of all the tools and machinery in a cutler's shop, together with all that might be manufactured or purchased within four years, was held to be a good, equitable lien, and protected as such under the bankrupt act; and while this case has been criticised by the Supreme Court of Massachusetts (Moody v. Wright, 13 Metc. 17, 30), and some others of the States have declined to follow it (Barnard v. Eaton, 2 Cush. 294; Hunter v. Bosworth, 43 Wis. 583; Chynoweth v. Tenney, 10 Wis. 397), yet it may be said to be at the present time the generally established American doctrine (Beall v. White, 94 U. S. 382; Butt v. Ellett, 19 Wall. 544; Pennock v. Coe, 23 How. 117; Brett v. Carter, 2 Low. 458; Apperson v. Moore, 30 Ark. 56; Schuelenburg v. Martin, 2 Fed. Rep. 747; Robinson v. Mauldin, 11 Ala. 977; Floyd v. Morrow, 26 Ala. 353; Gregg v. Sanford, 24 Ill. 17; Scharfenburg v. Bishop, 35 Iowa, 60; Phelps v. Murray, 2 Tenn. Ch. 746; Cook v. Corthell, 11 R. I. 482; Ellett v. Butt, 1 Woods, 214.)

This doctrine, announced by Judge Story in Mitchell v. Winslow, *supra*, was reviewed and affirmed in the leading case of Holroyd v. Marshall, 10 H. L. Cas. 191, which arose upon a mortgage of certain machinery and implements described in the schedule, and all other machinery and implements which should, during the continuance of the security, be placed on the premises described in the mortgage in addition to, or in substitution for, those enumerated in the schedule. The proceeding was in equity, against a judgment

creditor who had levied on the after-acquired property. In the lower court Lord Campbell held that, as the mortgagee had done no act to reduce the property to possession after it had been acquired, and prior to the levy, the equity of the mortgagee must give way to the legal rights of the creditor; but the decision of the lower court was reversed in the house of lords, and the doctrine announced by Judge Story fifteen years before was affirmed by the English court in a decision which has ever since been regarded as settling the law on that subject.

The equity rule in regard to mortgages was adopted by the codifiers, and has been embodied in our statute. The mortgage no longer conveys title to property either real or personal, but is a mere lien thereon (sections 4330, 4331, Comp. Laws); and, by provision of section 4328, Comp. Laws, "an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." By this section not only is an agreement to create a lien upon property not yet in existence valid, but the lien contracted for attaches the moment that the interests of the party himself attaches. There is no *interim* of time for hostile interests to intervene. There is no delay provided for within which the lienor is required to obtain a new or more formal instrument or contract of lien, or within which he must obtain from the other party a ratification of the original agreement, or reduce the property to actual possession under the contract already made. Under this statute the original contract, *ipso facto*, immediately upon the acquirement or creation of such property, awakens and brings into life the lien agreed upon. * * * *

ICE ON STREAM AND POND.

1. Ownership—Running Streams.
2. Same—Great Ponds.
3. Same—Mill Ponds.
4. Same—Canals.
5. Diminishing Water Supply by Cutting Ice—Injunction—Trespass.
6. Wrongful Conversion of Ice—Damages.
7. Acts Indicative of Appropriation.
8. Injury to Ice Field—Damages.
9. Right to Travel upon Ice.
10. Obstruction of Navigable Stream by an Ice Company.

1. *Ownership— Running Streams.*—Water in a running stream can never become, in any sense, the property of a riparian proprietor, even if he owns both banks, and the stream passes wholly through his lands; all the property that a man can acquire in flowing water is a right to its use. He may have a certain right of property in it, but the water itself is not his property. He has a right to the natural flow, and to use it for his cattle or his household, or upon his mill wheel, but he cannot stop its current nor divert its flow, nor increase or diminish it, in any appreciable quality, nor interfere with its quantity or character.[1] The owner of the fee is entitled to take ice therefrom, if the taking does not interfere with navigation, or with the use of the water for hydraulic or other rightful purposes.[2] It was observed by Sheldon, J., in an Illinois case, that the limitation in extent of the use of water by a riparian owner is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor as it passes along his land. That the only opposing rights are such rights of the public, and of such upper and lower proprietors. That when the water becomes congealed, these opposite rights are in no wise concerned. That the ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream when flowing over the land. That the just and reasonable use of the water which belongs to the riparian proprietor would be, in such case of congealed state the unlimited use and appropriation of the ice by him, as it would be no interference with rights of others. That there is such latter right of use, and that it should be held property, of which the riparian owner cannot be deprived by a mere wrong-doer, and furthermore that the defendants claim that it committed no trespass in taking the ice, because in the midst of a stream navigable in fact, is naturally an obstruction to navigation, and that any one has the right, having obtained access independent of the riparian owner, to enter upon the ice and remove it, is untenable for the reason that while, where a river is navigable, the public have an easement or a right of passage upon it as a highway, but not the right to remove the rock, gravel or sand, except as necessary to the enjoyment of the easement; the removal in this case was not for the purpose of making navigations more safe, but simply an appropriation for defendant's private gain.[3]

[1] Marshall v. Peters, 12 How. Pr. (N. Y.) 218. And see 3 Kent's Comm. 427; 2 Hilliard on Real Prop. 92; Angell on Water-courses, sec. 5; Middelton v. Pritchard, 3 Scam. (Ill.) 179; Chicago v. Laflin, 49 Ill. 172; Washington Ice Co. v. Shortall, 101 *Id.* 46.

[2] Edgerton v. Huff, 26 Ind. 36.

[3] Washington Ice Co. v. Shortall, 101 Ill. 46. And see McFarlin v. Essex Co., 10 Cush. (Mass.) 309; Adams v. Pease, 2 Conn. 481; Emons v. Turnbull 2 Johns.

And it was laid down in another case in the same State where a street of an incorporated village, situated upon the bank of the Mississippi river, extended to the center of the stream, that the fee of the street was in the corporation for the benefit of the lot owners and the public, and that the village authorities could properly interpose to prevent an intruder from cutting and removing ice which might have formed upon such street.[4]

2. *Same—Great Ponds.*—It has been held in Massachusetts that great ponds (those containing more than ten acres) which were not before the year 1647 appropriated to private persons, were by the colonial ordinance of that year made public, to lie in common for public use, and that fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own land adjoining them, or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the legislature have otherwise directed,[5] and likewise in Maine;[6] and furthermore, the right to cut ice in a great pond cannot be conveyed by the deed of an owner of land on its shore, who has acquired no rights, as against the public, in the water of the pond or in the land under it, by grant from the legislature or by prescription; and the covenants of warranty in the deed do not run with the land, so as to bind a subsequent grantee.[7] And it has been also held that a bill in equity which alleges that the plaintiff is the owner of the right to take ice from a certain portion of a "great pond," within the meaning of the colonial ordinance of 1641, respecting such ponds, and of a fishing right therein, and of the outlet thereof, is on demurrer, a sufficient statement of the plaintiff's title to equitable relief against an unauthorized injury to these rights, and a diversion of water from the outlet.[8]

3. *Same—Mill Ponds.*—The owner of an easement to overflow another's land, is not entitled to the ice which forms on the water covering the land; it belongs to the owner of the fee. For the owner of a servient estate has a right to all the profits which may arise from the soil, and may make such use of the soil as is not inconsistent with the easement. As was observed in one case: "Notwithstanding such easement, there remains with the grantor the right of full dominion and use of the land, except so far as a limitation of their owners' right is essential to the fair enjoyment of the easement granted. Neither is it necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him because they are not granted. And for the same reason the exercise of any of them cannot be complained of by the grantee, who can claim no other limitation upon the rights of the grantor, but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment. The right of a mill owner to pond water on anothers' land, the right of one owner to use anothers' land for a sluiceway, the right of one owner to use another's land for drainage purposes, are all easements, and nothing more. Easements do not take from the owner of the fee the right to make any profitable use he can of his property not inconsistent with the dominent estate. The right to back, or pond water on his land of another, whether acquired by a statute or by prescription, gives no right to the land itself, nor to the profits which a use of it, not injurious to the easement, will produce."[9] In a late Maine case the court held that the owner of a mill dam on an unnavi-

(N. Y.) 313; State v. Pottmeyer, 33 Ind. 402; Myer v. Whitaker, 55 How. Pr. (N. Y.) 376; Lorman v. Benson, 8 Mich. 18; M. R. W. Mfg. Co. v. Smith, 34 Conn. 462; Brown v. Brown, 30 N. Y. 519; Ill. & St. L. R. R. & Coal Co. v. Ogle, 92 Ill. 353; McLean Co. Coal Co. v. Lennon, 91 *Id.* 561; Robertson v. Jones, 71 *Id.* 405.

[4] Brooklyn v. Smith, 104 Ill. 429.

[5] Inhabitants of West Roxbury v. Stoddard, 7 Allen (Mass.), 158.

[6] Barstow v. Rockport Ice Co., 77 Me. 100.

[7] Gager v. Steinkraus, 131 Mass. 222.

[8] Tudor v. Water Works, 1 Allen (Mass.), 164.

[9] Hydraulic Co. v. Butler, 91 Ind. 134. And see Edgerton v. Huff, 26 Ind. 35; State v. Pottmeyer, 33 Ind. 402; *s. c.* 5 Am. Rev. 224; Julien v. Woodsmall, 82 Ind. 568; Bean v. Coleman, 44 N. H. 539; O'Linda v. Lothrop, 21 Pick. (Mass.) 292; Baker v. Frick, 45 Md. 339; *s. c.* 24 Am. Rep. 506; Emons v. Turnbull, 2 Johns. (N. Y.) 313; Maxwell v. McAtee, 9 B. Mon. (Ky.) 20; Baer v. Martin, 8 Blackf. (Ind.) 317; Snowden v. Wilas, 19 Ind. 10; Mason v. Hill, 5 B. & Ad. 1; Earl v. Detcart, 1 Beasley (N. G. Eq.), 280; Williams v. Nelson, 23 Pick. (Mass.) 141; Paine v. Woods, 108 Mass. 160; Storm v. Mauchaug Co., 13 Allen (Mass.), 10.

gable stream, who does not own the bed of the stream above the dam, has a qualified interest in the water flowed but none in the ice formed upon it, that the riparian owner is the owner of the ice in such case, though the ice privilege is made by the flowage, and that where the owner of a mill dam maliciously and unnecessarily draws the water from the pond and thus destroys the ice field, he is liable in damages to the riparian owner who owned the land under the pond.[10] And so it has been held in Michigan;[11] and in Indiana where ice valuable as an article of commerce, was removed without license, by cutting, from a pool formed by a dam in a stream not navigable, by a person owning the land opposite the place where the ice was cut, the portion of the pool from which the ice was removed being over the land of another, such act was held a trespass, under a statue providing "any person who, without a license from competent authority, shall remove from the lands of another any tree, stone, timber or other valuable article, shall be guilty of a trespass."[12] And it has been held in Maine that a deed of a tide-mill privilege, mill dam, wharf privilege and the right to flow a creek and adjoining lands to high water mark, "and all the rights connected with and belonging to said mill privilege," gives the grantee no right to ice cutting, nor title to the ice formed upon a fresh water pond raised by changing the dam so as to exclude the salt water.[13] On the other hand in a New York case of some interest the facts being as follows: One S was at the time of the bringing of the suit, the owner of the land upon which the dam in question rested, and the land covered by the waters of the pond, except a small portion owned by one O. O by deed conveyed to the grantor of S, "the right, privilege and liberty to overflow so much of the said lands above mentioned as are now, or at any time after may be, overflowed by means of the said dam, or by any other dam which may be erected in place of said dam." In February, 1876, M and R, of which the plaintiff was the survivor, purchased all the ice in the pond, formed or to be formed, from S. Previous to the gathering of the ice from the pond, a freshet occurred which carried out of the pond a large part of the ice formed therein, and loosened that which was in controversy, from the shore, and would probably have swept that out also, had not plaintiffs, by holes cut therein, fastened it to the shore and thus detained it. After plaintiffs had commenced to remove and gather the ice, the defendants went to the part of this pond, over O's land by permission of O, and cut a large quantity of ice thereon against the forbidding of the plaintiffs, and in spite of such forbidding opened a canal or channel across the pond, and over that part of it which was upon the land to which S had title, and floated the ice, so cut by them, through such canal or channel, and gathered and sold the same, the court held, that an action for the recovery of the value of the ice so taken, could be maintained upon the ground alone, of the abstract right of the plaintiffs, obtained by the purchase from S.[14] And we find it laid down in Connecticut that owners of a mill pond own the ice formed upon it, and that the riparian proprietors have no right, as owners of the soil, to remove it.[15]

4. *Same—Canals.*—In an Indiana case the facts were as follows: The board of trustees of the Wabash and Erie Canal, by a written agreement with A, and certain other parties, partners by the name and style of the Wabash and Erie canal Company, for a consideration named therein, transferred, for a specific time, "all the tolls and revenues to be derived, or which might accrue, from," the use of such canal after the payment therefrom of certain expenses and expenditures stipulated for therein, under which agreement such company took possession thereof. "A," as a member of such company, during the existence of such agreement, took from such canal large quanties of ice. It was held its right being disputed, that such company, under its contract, was as much entitled to the ice and the proceeds thereof, as it was to the tolls or water rents;[16] and it has also been held in Illinois, under an act providing that "all parties resident upon the line of the Illinois and Michigan canal shall be allowed to cut

[10] Stevens v. Kelley, 78 Me. 445.
[11] Lorman v. Benson, 8 Mich. 18.
[12] State v. Pottmeyer, 33 Ind. 402.
[13] Dyer v. Norris, 72 Me. 181.
[14] Myer v. Whitaker, 55 How. Pr. 376; 7 Cent. L. J. 141.
[15] Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462.
[16] Cromie v. Trustees, 71 Ind. 208.

and remove ice from said canal," etc., that any person living so near the canal as to desire to avail himself of the privilege given, will be deemed to live upon the line within the meaning of the law.[17] But where the legislature of a State authorizes its public agents to appropriate a *fee-simple* in lands taken for the construction of its canals, the former owner has no right to take ice therefrom.[18]

5. *Diminishing Water Supply by Cutting Ice—Injunction—Trespass.*—And in a Massachusetts case it being sought to enjoin an upper proprietor from cutting ice upon the ground that his doing so would materially reduce the quantity of water in the stream. Shaw, C. J., expressed himself as follows: "It is quite doubtful considering the complainant's claim as a claim for actual and substantial damage done to their mills, whether the cutting and carrying away the ice mentioned, or of any quantity of ice, would diminish the volume of water which would come to the complainant's mills, and of which they could avail themselves for driving their mills. Ice must be cut in the winter. It usually melts in the latter part of winter, or early part of spring, together with the ice and snows of the surrounding country, and these, together with the rains which cause and promote them, constitute what are usually called the spring floods, which commonly cause a great surplus of water in similar mill streams, not only not available to any useful purpose, to mills, but often injurious. And it may well be doubted if any quantity of ice cut from such pond, whether after the spring floods have subsided, and its useless surplus of water passed away, and long before the approach of any "dry season," the water in the pond would not be as full and copious for all mill purposes as if no ice had been cut.

* * * * * * * *

The respondents are alleged to have taken away 5,000 tons of ice from a pond of one hundred acres in extent. Taking these conjectural estimates to be true, we presume this might amount to only a small fraction of an inch of water in depth; an amount which we presume might be carried off by evaporation, in a dry windy day in February or March, and which, if concentrated and preserved, might have driven the mills of the complainants an hour or a few hours."

* * * * * * *

The bill was dismissed, the court holding that equity would not take cognizance of such cases until the rights of the parties had been determined at law.[19] And where the owner of a mill and the land on one side of the center of a mill pond, granted a license to an individual to take ice from that portion of the same, it was held in a New York case, that the grantee on complaint that another person was infringing upon his premises by taking and carrying away ice, although he might maintain an action of trespass, was not entitled to an injunction to restrain the taking of the ice.[20] But it has been held in Michigan, that there is no trespass in taking fish from a small lake nearly surrounded by another's land, unless the land owner has given notice that it will not be allowed.[21]

6. *Wrongful Conversion of Ice—Damages.*—Where a person takes the ice in a stream over the land of another, to which the owner of the land has the exclusive right, the measure of damages in trespass for such wrongful taking is the value of the ice as soon as it is made a chattel—that is, when scraped, plowed, sawed, cut and severed, ready for removal,[22] and where after purchasing ice the parties so doing, by their own exertions, save it from being lost by anchoring it to the shore, and by labor performed thereon, they are in actual possession, and are entitled to recover, for a conversion and taking thereof.[23] And in a Michigan case, the ice in question was formed upon water which had spread over a space of low ground partly belonging to Hendrick Coats, forming a basin, the land being dry in summer, and the rest of the year overflowed from a small creek leading into it. After the ice formed, and in February, 1878, Coats, by a parol bargain, sold all the ice in his part of the basin to Higgins for fifty cents. The parties at the time stood near by in view of the ice, and the quantity sold was pointed out, and the money paid. The ice was then

[17] Card v. McCaleb, 69 Ill. 325.

[18] Water Works Co. v. Burkhart, 41 Ind. 364, overruling Edgerton v. Huff, 26 Ind. 35.

[19] Cummings v. Barrett, 10 Cush. (Mass.) 186. And see Elliott v. Fitchburg R. R. Co., *Id.* 191. Compare Wood v. Fowler, 26 Kan. 682.

[20] Marshall v. Peters, 12 How. Pr. (N. Y.) 218. See Myer v. Whitaker, 55 *Id.* 376.

[21] Marsh v. Colby, 39 Mich. 626.

[22] Washington Ice Co. v. Shortall, 101 Ill. 46.

[23] Myer v. Whitaker, 55 How. Pr. 376.

all uncut. About two weeks thereafter, John Loder, knowing that Higgins had purchased and claimed the ice, and having been warned thereof by Coats, offered him five dollars for the ice, which he accepted, and Loder cut it, and sold it to Kusterer, who had made a previous verbal contract with Loder for it. Higgins was present when the ice was loaded on Kusterer's sleigh and forbade the loading and removal on the ground that he had purcased it from Coats. Kusterer referred the matter to Coats, who said he had sold it to Loder. Upon the question as to whether Higgins was owner of the ice, the court held, that the original title to ice is in the possessor of the water where it is formed, and passes with such possession, and that a ny sale by itself of ice already formed, whether in or out of the water at the time, is a sale of personalty. The plaintiff recovered the value of the ice.[24]

7. *Acts Indicative of Appropriation.*—Scraping off snow from the surface of the ice in a public pond, and driving stakes, give a person no title or right of possession to the ice included within the stakes, and no action will be against another for cutting and removing such ice.[25] But the doctrine has been held in Kansas, that an owner to the bank of a stream, the title to the bed thereof being in the State, does not own the ice which is formed on the stream adjacent to his land, and, without first taking possession of and securing it, may not maintain an injunction to restrain a stranger from cutting and removing it;[26] and, in Missouri, that one having sawed, marked, and staked off ice, unappropriated by another, upon a navigable river, and having expended money to preserve it and make it valuable for use, and as a commercial commodity, has a possession sufficient to support an action for trespass.[27]

8. *Injury to Ice-fields—Damages.*—In a Michigan case the facts were as follows: In January, 1878, the complainant was an ice company doing business in Detroit, and was lessee of a portion of Belle Isle in the Detroit river, consisting chiefly of water front. The respondent steamer was a ferry boat used and employed in ferrying between Windsor and Detroit. Occasionally she was used for towing upon the Detroit river and adjacent waters. On the leased property, running along inside of the channel bank of the Detroit river, the complainant had constructed a boom 3,600 feet long, containing 1,099,600 square feet, outside of a line fifteen feet from shore. On the shore, adjacent to this pond, complainant had fifteen ice houses, capable of holding about twenty thousand tons of ice. On January 11, 1878, this pond was frozen over with hard, clear ice, six inches thick; on that day the Detroit river was entirely open, and the steamer was taken by her master from her dock below Belle Isle, up beyond, then turned and run down part way, thence up, then down, up again, then down to Detroit. Complainant claimed that the steamer was run on these trips unusually near the boom, and that the swell caused by the steamer broke up the ice in the boom so that complainant was unable to harvest it. The width of the channel of the Detroit river opposite this boom, was upwards of eighteen hundred feet. This was the first crop of ice that had formed that winter, and the weather thereafter was so mild that no more ice fit to cut formed in the boom; consequently complainant failed to get a stock to fill its ice houses. The court held that an action of damages would lie therefor, and that in the case in question the verdict in the sum of $2,500 was not excessive,[28] and furthermore, that the measure of damages for the wanton destruction of miniature property, such as a field of forming ice, is the value of so much as would probably have been saved for market, less the expense of stowing it,[29] and it was likewise intimated in the above case, that where action is brought, when the full extent of the injury can be estimated with reasonable correctness in view of the uncertainty whether it would ever have reached maturity, that the same may be estimated accordingly and need not be confined to the actual loss at the time the property was destroyed.[30]

9. *Right to Travel upon Ice.*—It was held

[24] Higgins v. Kusterer, 41 Mich. 318; 9 Cent. L. J. 247.

[25] People's Ice Co. v. Davenport, 21 N. E. Rep. (Mass.) 385; Rowell v. Doyle, 131 Mass. 474.

[26] Wood v. Fowler, 26 Kan. 682.

[27] Hickey v. Hazard, 3 Mo. App. 481; Myer v. Whitaker, 55 How. Pr. 376.

[28] People's Ice Co. v. Steamer Excelsior, 44 Mich. 229.

[29] *Id.* 230.

[30] *Id.* 239.

in a Maine case, as to the right of the public to travel upon a frozen stream that the waters of the Penobscot river were as much a public highway when congealed as when fluid, and that any one cutting holes through the ice upon or near the place where there has been a winter way for twenty years, is liable for all damages sustained by those traveling upon such way without carelessness or fault on their part.[31] But those who appropriate to their use portions of a public river for ice-fields, should guard their ice-fields, after they have been cut into, so as not to expose to danger any persons who may be likely innocently to intrude upon the same.[32] But in such locations one should keep the traveled way, for to do otherwise might well be in many cases such a degree of negligence as would preclude recovery;[33] highways whether by land or water must be used with due regard to their lawful and proper use by others; the right of navigation, though paramount, is not exclusive, and cannot be so exercised as to wantonly destroy private rights or property that can be enjoyed consistently with it; such as the rights to maintain ice-fields or stake nets, or to run logs, or establish boom limits and dock lines.[34]

10. *Obstruction of Navigable Stream by Ice Company.*—A dam built across an arm of the sea, into which a fresh water creek empties, to exclude the salt water, for the pupose of creating a fresh water pond, upon which to cultivate and harvest ice for the market, without direct authority of the legislature or the delegated action of harbor commissioners, if the case falls withing their jurisdiction, is in the same sense a public nuisance as it would be to build a solid wall across a road or street; and furthermore, without such authority such a dam never acquires the right to exist by prescription.[35]

SOLON D. WILSON.

[31] French v. Camp, 18 Me. 433. And see Woodman v. Pitman, 79 Me. 456.
[32] *Id.* 457.
[33] *Id.* 458.
[34] People's Ice Co. v. Steamer Excelsior, 44 Mich. 229.
[35] Dyer v. Curtis, 72 Me. 181.

LIBEL — PRIVILEGED COMMUNICATIONS — MERCANTILE AGENCIES.

WOODRUFF V. BRADSTREET CO.

Court of Appeals of New York, October 8, 1889.

1. In an action of libel to recover damages from a mercantile agency for publishing a statement that a judgment had been obtained against a certain individual, no special damages being alleged, it is *held*, that the question as to whether the same was libelous or slanderous as an imputation against the soundness of his financial condition, was properly one of law for the court, and not within the province of the jury.

2. In the case presented this court declines to interfere with a judgment in behalf of defendant, setting forth that the publication in question was not a libel *per se*.

BRADLEY, J.: The question presented is whether, in any view which can be taken of the publication, the words there used were libelous *per se*. The plaintiff was engaged in the business of manufacturing and selling brick in the city of Watertown. It must be assumed that at the time of the publication he was in good financial and business standing, and that publication as to him was false. His reputation in that respect was his property, and he had the right to its protection against defamation; and any published imputation against him in that relation, which could be so construed as to import insolvency, or a condition of financial embarrassment, would be ground for an action, because it is the policy of the law to afford protection to the credit of merchants and traders, for reasons which it is now unnecessary to repeat. The plaintiff came within that class, and his reputation in relation to his business as such was entitled to such protection. Mott v. Comstock, 7 Cow. 654; Sewall v. Catlin, 3 Wend. 291; Ostrom v. Calkins, 5 Wend. 263; Carpenter v. Dennis, 3 Sandf. 305. The plaintiff has not sought to support this action by any charge of special damage, but rests it solely upon the ground that the law will imply that damages have been the consequence of the publication. The inquiry, is whether the statement that a judgment for $4,000 had been recovered against the plaintiff was an imputation against his financial credit or pecuniary responsibility. This must depend solely upon the import which may be given to the words in their relation to him in that respect, without the aid of any extrinsic circumstances to give them any other or different construction or import than the same words would have if published of and concerning any person within the class before-mentioned. The proposition, therefore, is whether to publish of a merchant or trader that a judgment has been recovered against him is the employment of words, in themselves libelous or slanderous, as an imputation against the soundness of his financial condition. There is no ambiguity or uncertainty about the import of the words in question. It is

when words spoken or published are ambiguous in their import, or may permit in their construction, connection, or application a doubtful, or more than one, interpretation, and in some sense may be defamatory, that the question whether they are such is for the jury. Lewis v. Chapman, 16 N. Y. 369; Sanderson v. Caldwell, 45 N. Y. 398. In the present case there was no occasion for such inquiry. The question in that respect was one of law for the court. Matthews v. Beach, 5 Sandf. 256; Green v. Telfair, 20 Barb. 11; Hunt v. Bennett, 19 N. Y. 173, 177; Pittock v. O'Neil, 63 Pa. St. 253.

It must be taken as true, as alleged in the complaint and stated in the opening, that the organization of the defendant was for the purpose of ascertaining and reporting the financial standing and ability of merchants, traders, and other business men throughout the country, and that such reports were from time to time issued and sent to its subscribers. It is therefore argued that the purpose of this report was to affect or to impair the credit of the plaintiff, and that such must be presumed to have been its effect. The circumstances under which a publication is made concerning a party, and the connection or association given to it by other matter published with it, may tend to characterize the words used so as to give to them an import productive of an imputation which otherwise they could not have. This was illustrated in the cases of Zier v. Hofflin, 33 Minn. 66, 21 N. W. Rep. 862; Shepheard v. Whitaker, L. R. 10 C. P. 502, 14 Moak, Eng. R. 395; Erber v. Dun, 12 Fed. Rep. 526. In cases of that character there may be a question for the jury to determine in view of the situation and relation so represented, and upon their finding may be dependent the question whether the words used are libelous. In the case at bar there is nothing except the import of the words themselves to characterize their purpose or effect, other than the fact that the business of the defendant was to furnish information of the pecuniary condition of persons whose vocations were such as to be likely to render business credit desirable. It is not seen that the character of the enterprise in which the defendant was engaged gave to the mere statement of what purported to be a fact anything more than it expressed or fairly implied. The meaning of words in an action of slander or libel cannot be extended by innuendo beyond their import, aided, as they may be, by extrinsic facts with which they are connected. Its use or purpose is to explain the application of words by connection with such facts and circumstances as are alleged. There are none alleged here which will justify the inference that the publication issued by the defendant carried with it any meaning essentially different than it would have taken from any other source. The fact that its apparent authenticity may have been greater is not important. The information sought to be given by the report was that a judgment had been recovered against the plaintiff for the amount, and, as the consequence, he was charged by it with liability to that extent. That was what the defendant's subscribers were permitted, from its report, to understand had occurred. It might or might not make inquiry, preliminary to further credit, desirable. That might depend upon the known or unknown pecuniary ability of the party. In its relation to parties generally such would be the uncertainty of its effect; and it is the rule in its general application and effect, as to all persons in the class before referred to, that is now under consideration, because the publication of such a statement when untrue is libelous *per se* in all such cases or none. The fact in some cases it might result in the denial of credit and otherwise be injurious to party, represented to be charged with liability, does not necessarily require the conclusion, as matter of law, that the publication was in itself defamatory. But in such case the party would be entitled to his remedy, supported by special damages alleged as the consequence of the false publication. The recovery of a judgment does not necessarily import conceded default in payment of a debt. It is a matter of frequent observation that controversies, arising apparently out of an honest difference of opinion, go into the courts for determination. Litigation also not unfrequently comes from causes in which is involved no personal credit or default. There is nothing in the defendant's report to indicate that the judgment was produced by any cause prejudicial to the credit of the plaintiff, and there is no presumption in that respect upon the subject in aid of the action. There was nothing for the consideration of the jury bearing upon the question whether the publication was libelous, and we think the trial court properly held, as matter of law, that it was not such *per se*. The plaintiff, therefore, was not entitled to recover general damages; and, as no special damages were alleged, there was no question for the jury upon that subject. Newbold v. Bradstreet, 57 Md. 38.

The cases cited by the plaintiff's counsel have been examined, and none of them seem to support his contention. In Williams v. Smith, L. R. 22 Q. B. Div. 134, the publication in the Hatters' Gazette, London, for December, 1887, was to the effect that a judgment recovered against the plaintiff, who was a hatter, on the 13th day of October previous remained unpaid. This appeared under headings, and in a column known as a "black list." The judgment was recovered as stated, and had been paid. It was held that the place where the words were located in the Gazette, and the inference which was permitted by their use,—that the judgment remained unpaid,—thus indicating the plaintiff's default, justified the interpretation given by the jury which rendered the publication libelous. That case is distinguishable from the present one by reasons which may support that recovery without aiding the plaintiff in this action. In King v. Patterson, 49 N. J. Law, 417, 9 Atl. Rep. 705, the alleged li-

bel was the publication of a statement to the effect, as construed, that the plaintiff, who was engaged in the clothing business, had put a chattel mortgage on her stock of goods. The case, as reported, indicates that special damages were alleged and proved; and, so far as it there appears, the main ground of defense, upon the law, was that the publication was privileged. That was the only question considered on review. By a divided court it was held not privileged. Upon that propsition the views of the court in Sunderlin v. Bradstreet, 46 N. Y. 188, were adopted.

The distinction in principle between the King Case and the present one, as well in the character of the report as in that of the damages alleged, is obvious. There the purport of the publication was that the plaintiff had mortgaged her stock of goods to secure an existing debt, and thus placed herself in a situation liable to result in embarrassment by means of the opportunity furnished by giving the mortgage to interrupt and break up her business. In such case an inference might be permitted that she would not place herself in that situation without an existing necessity for the protection of her business arising out of inability to pay. In that respect that case is distinguishable from Newbold v. Bradstreed, *supra*. The additional cases cited do not seem to require any special attention or comment here. These views lead to the conclusion that the judgment should be affirmed. All concur, except Follett, C. J., and Vann, J., not sitting.

NOTE.—1. *Libels which have a Tendency to Injure one in his Office, Profession, Calling, or Trade.*—Every man has a right to the profits of his industry, and by a fair reputation and character in his particular business, to the means of making his industry fruitful. At common law therefore, an action lies for words which slander a man in his trade, or defame him in an honest calling. As to say of a merchant, he is a bankrupt,[1] or that he is insolvent, or guilty of conduct which would prejudice him in his business, or be injurious to his standing and credit as a merchant or business man.[2]

2. *Same—Privileged Communications.* — The law however, respects communications made in confidence, notwithstanding they may be false and erroneous, and prove injurious to the party. But if the communication be malicious as well as false, and under the cloak of private confidence be meant to defame, it will not be considered as privileged. A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered, when the party to whom it is made has an interest in it, and such party stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.[3]

3. *Same—Mercantile Agencies.*—The utility of mercantile agencies being unquestionable, and their usefulness being dependent on their confidential limitations, it is not strange that these limitations should be not only maintained, but insisted on by the courts, and this in two ways. If the limitations of confidence are thrown off by the agency,— in other words if it publishes to the world the information it collects,— then it is liable in damages to parties whose characters it disparages, or whose standing it impugns. On the other hand, if it confines itself to the confidential communication of such information to its customers, then if it is *bona fide* and without malice or recklessness, these communications are privileged, and the defendant if sued for a libel in making such communications, would be entitled to a verdict.[4] Thus, in an action of slander it was shown that by the terms of the subscription to an agency * * * all information was to be considered strictly confidential and furnished only for the use of subscribers. That one Benton, a subscriber, holding a note indorsed by the plaintiff applied to the defendant for information as to his credit, responsibility, etc. The books of the agency were consulted by the clerks and the result communicated to the defendant, who thereupon informed Benton that plaintiff was a bad man, etc. It was held a privileged communication.[5] But where defendants, in the course of their business, issued "daily notification sheets," and sent them to all their subscribers, irrespective of their interest in the question of the plaintiff's credit and standing, and this sheet was distributed to persons having no interest in being informed of the condition of plaintiff's firm, it was held that this fact robbed it of the protection of a privileged communication, and that if it contained a libel on the plaintiffs, defendants could not escape responsibility for such libel on the plea that it was a privileged communication to their subscribers.[6] In the earliest case of the sort in this country the facts were as follows: The plaintiff was a merchant and the defendant the proprietor of the "Boston Mercantile Agency." The defendant had received from his agent, on what was supposed to be reliable authority, a report injurious to the credit of the plaintiff. This report had been read by defendants' clerks to regular subscribers to defendants' agency, who were interested in knowing the standing of the plaintiffs. The report was incorrect and unjust. The court charged that if the defendant, as the constituted agent of a commercial house, upon the application of his principal, made inquiries at the proper places and under proper and reasonable guards to insure accuracy and privacy as to the information thus attained, and the information which he thus attained was repeated *bona fide* to his employer, and to him alone, as the result of such inquiries, and for the purpose of governing his conduct in his business transactions with the party as to whom the inquiry was made, such communication may be justifiable as a confidential communication, and the defendant would not be responsible although the information was incorrect and unfounded, in fact, the defendant acting in good faith, and believing it to be true at the time he communicated it, but that the privilege of a confidential communication would be confined to the agent, and if the principal repeated it to others he would be responsible.[7] In an early New York case the facts were as follows, several mercantile firms of the city of New York associated together and employed the defendant to travel in the southern and western States to obtain information in relation to the standing of merchants and traders residing there.

1 Holt's Law of Libel, 218, citing 1 Rol. 61, pl. 35, 40.

2 Erber v. Dun, 12 Fed. Rep. 526.

3 *Id.* 527. And see Toogood v. Spryling, 1 Camp. M. & 143.

4 Note by Francis Wharton to Trussell v. Scarlett, 18 Fed. 220; Bradstreet Co. v. Gill, 5 S. W. Rep. 753; Comm. v. Stacey, 8 Phila. 617; Erber v. Dun, 12 Fed. Rep. 526; Lanning v. Lonsdale, 48 Wis. 349.

5 Ormsby v. Douglass, 37 N. Y. 477.

6 Erber v. Dun, 12 Fed. Rep. 526.

The information obtained was transmitted in the form of a report to one of the associated firms, and by them printed and a copy sent to each member of the association. The defendant having made a report unfavorable to the credit and standing of the defendant, a merchant in Mississippi, which report was circulated in the usual manner, the plaintiff brought an action for libel and recovered judgment, which being affirmed by the court *in banc* an appeal was taken to the court of appeals on the question of libel or no libel, it was held that the publication could not be considered a privileged communication.[8] In another New York case the facts were as follows: The defendant had a commercial agency, and distributed to his subscribers semi-annually 10,000 copies of a publication giving the credit and standing of merchants. He also issued a weekly sheet of "corrections" which was sent to all subscribers to the semi-annual publication, and which contained the alleged libelous matter to-wit: that the plaintiffs had failed, which was false. Judgment was rendered against defendant on the ground that the communication was made to persons who had no special interest therein.[9] In a Maryland case the facts were, viz: There was published in *Bradstreet's Daily Sheet of Changes*, January 15, 1878, the following line. "Chattels.—Newbold & Sons to J. R. Burns." James F. Newbold *et al.* brought suit against J. M. Bradstreet & Son for libel, claiming that the few words quoted implied that they had given a chattel mortgage—an implication which would tend to injure their credit. They maintained that, as a matter of fact, they had only released a chattel mortgage which they had held. The court ruled that the words were libelous *per se*, and that hence they were not actionable without proof of special damages.[10] In an early Scotch case the facts were as follows: Appellants were directors of a Scottish Mercantile Society, formed "to concentrate and bring together, from time to time, a body of information for the exclusive use of the members, relating to mercantile credit of the trading community, with a view of diminishing the hazards to which mercantile men were exposed." The rules required the secretary to collect from the public records of protests, etc., the names and designations of debtors, in trade, etc., and to print this information and forward it monthly to each member of the society. The respondent had dishonored two notes and procured an interdict against the publication of the protests by the appellants. The laws of Scotland required all protests to be registered in a public register, and it was conceded that the extracts complained of were taken from this record, and were made for a limited purpose, and for the use of the society. The House of Lords held that the action of the society was legitimate and that there was no evidence of malice.[11] In an English case the facts were: the subscribers of an association called the "Underwriters Registry" had a ship registered by the association as in the highest class. Afterwards a committee of the association caused a survey with the plaintiffs' consent, to be made and then published in their registry of ships, the words "class suspended" against the plaintiffs' ship. For this the plaintiffs applied for an injunction, but Malins, V. C., held that the defendants were justified in notifying their subscribers and the public their honest opinion as to the merits of the ship, and had a right to suspend the class until the ship should have been altered by the plaintiffs.[12] And in another, the defendants class newspaper, called "The Bookseller," published under the head of "Bankruptcies" an extract which properly belonged to the head of "Dissolutions of Partnership." The consequence was, that the firm sued the publisher for representing that they were bankrupts, and the judge directed the jury to say whether the publication was libelous. The jury said it was, and gave damages of 50*l*.[13]

4. *Same. Same—Publication of Judgments.*—The general rule that the publication of a fair and correct report of proceedings taking place in a court of justice is privileged, extends to the record of a judgment entered upon a warrant of attorney. But the publication must be correct, and without inference, or comment.[14] In an Irish case, the facts being similar to those of the principal case it was held that the publication of a public record (*e. g.*, a judgment) of a court of justice is not, *per se* an actionable libel; and in an action for publishing it, the question whether it was published with "express malice," ought under the plea of "no libel" to be submitted to the jury.[15] In another and similar Irish case, "A" brought an action, complaining of a publication stating that a judgment had been obtained against him. His summons and plaint contained counts in libel, and in false and malicious representations. At the trial, the publication by the defendant was proved, and it was also proved that the publication was untrue. But there was not any evidence of actual malice. The jury found generally for the plaintiff, with 150*l* damages. The cause of action in all the counts was substantially the same, and they were supported by the same evidence. *Held*, that the court, upon motion for a new trial, had power to enter the verdict for the plaintiff upon the libel counts only, and that evidence of malice in fact was not necessary in support of the counts in false representation.[16]

5. *Burden of Proof—Evidence.*—In order to bring a criminating statement within the class of communications having a qualified privilege, the burden is on the defendant, in an action for libel or slander to show: First, that the occasion was privileged; second, that the statement was made under an honest belief of its truth.[17] But a communication which would otherwise be privileged, if made with malice in fact, or through hatred, ill will, and a malicious design to injure, is not a privileged communication, but the burden of proving this is on the plaintiff to show malice in fact.[18] Witnesses in possession of a key to defendants' reports may be permitted to testify as to their meaning.[19]

7 Billings v. Russell, 8 Boston L. Rep. 699.

8 Taylor v. Church, 8 N. Y. 452. The notice was in the following words, viz: "Taylor, Hall & Murdoch, Columbus, Miss.: This concern does not seem to thrive here. 'M' is capable in some respects, but is not a successful manager. He is remarkably systematic and particular in details, and a superior office clerk, but lacks the other and more essential requisites of a good merchant. 'H' is rather a negative character. Taylor resides in New York, and sends out undesirable, ill-assorted odds and ends, and unsalable stock. He was formerly with Beri King, and I am told is an unprincipled character."

9 Sunderlin v. Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322.

10 Newbold v. Bradstreet, 57 Md. 38.

11 Fleming v. Newton, 1 H. L. Cas. 363.

12 Clover v. Royden, L. R. 17 Eq. 190.

13 Shepheard v. Whitaker, L. R. 10 C. P. 502.

14 M'Nally v. Oldham, 16 C. L. J. (N. S.) 298.

15 Cosgrove v. The Trade Auxiliary Co., 8 Ir. R. C. L. 349.

16 Jones v. M'Govern, I. R. 1 C. L. 681.

17 Fahr v. Hayes, 13 Atl. Rep. 261.

18 Erber v. Dun, 12 Fed. Rep. 526; Bradstreet Co. v. Gill, 9 S. W. Rep. 757.

19 *Id.* 753.

6. *Damages.*—Where a publication is libelous, the law presumes that it was made with malice—technical, legal malice, but not malice in fact—and the amount of damages depends in a large degree upon the motives which actutated defendants in its publication, and in such cases, the law leaves it to the jury to find and return such damages as they think right and just, by a sound, temperate, deliberate, and reasonable exercise of their functions as jurymen.[20]

* * *

[20] Erber v. Dun, 12 Fed. Rep. 527. See generally "Libels Touching Persons in their Callings," 11 Cent. L. J. 483; "Libels Imputing Insolvencies," 16 Cent. L. J. 286; "Libel—Publication—Corporations," 27 Cent. L. J. 3.

JETSAM AND FLOTSAM.

KANSAS STATE BAR ASSOCIATION.—The State Bar Association will hold its annual meeting in Topeka, on Tuesday, January 7, 1890, at 7 p. m.

Hon. Thomas Ewing, of New York, the first chief justice of the supreme court of that State, will be present and deliver an address. First associate justices Kingman, of Topeka, and L. D. Bailey, of Garden City, will also be there and talk to the association. Thus, after twenty-nine years have elapsed, all of the first supreme judges and all of the survivors of the first elected district judges of the State will be present with the State bar association.

Judge S. O. Thatcher, who was elected district judge of the fourth judicial district at the adoption of the constitution, will talk of early times.

The association will meet in the senate chamber at 7 o'clock p. m., and after the reports of the standing committees have been heard and acted upon, Judge John Guthrie, the president, will deliver the annual address.

NEW YORK STATE BAR ASSOCIATION.—The next annual meeting of the State Bar Association will be held at the capitol, Albany, January 13 and 14, next, with the following programme for the occasion:

Annual address, Col. Robert G. Ingersoll. Subject: "Crime against Criminals."

Paper by Hon. N. C. Moak. Subject: "Liability Between Relatives for Services, Support, and on Alleged Implied Contracts."

Banquet at Delavan House, Tuesday evening, January 13, 1890.

RECENT PUBLICATIONS.

THE GENERAL PRINCIPLES OF THE LAW OF CONTRACTS, in the Form of Rules for the use of Students. By Reuben M. Benjamin, Professor of Law in the Illinois Wesleyan University. Bloomington, Ill.: Published by R. M. Benjamin. 1889.

This little book of nearly two hundred pages will be found of especial value to students and, we are informed, is being used in some of the law schools with great success. It purports to state methodically the general principles relating to the formation, interpretation and discharge of contracts. The text is in the shape of rules, followed by such comments, reasons and illustrations as seemed suitable to bring out clearly before the mind of the student the import of each proposition. Each rule is supported by the authority of adjudged cases in the shape of notes. The author, who is a well known professor of law in the Illinois Wesleyan University, expresses the belief that the principles of contract can and at some future day will be satisfactorily codified. To judge from this book such a prediction is not without reason. The book is well printed in clear type and completely indexed.

A TREATISE ON THE LAW OF COMMERCIAL PAPER, including all Species of Instruments of Indebtedness, whether Negotiable or Assignable, which are used in the Commerce of the World. By Christopher G. Tiedeman, A. M., L. L. D., Professor of Law in the University of Missouri, and author of "The Law of Real Property," "Limitations of Police Power." St. Louis: The F. H. Thomas Law Book Co. 1889.

It requires more than an ordinary examination to determine the merits of a work containing over one thousand pages and citing in the neighborhood of ten thousand cases. But a reviewer is justified in indulging in some presumptions, which though not of a legal character are none the less permissible. For instance, it is reasonable to suppose that a man who has written two or three books of great merit can write another, and that having established a reputation he will hardly imperil it by the publication in his name of an inferior book. And so to make the application, Professor Tiedeman having given us first-class treatises on "The Law of Real Property" and "Limitations of Police Power," we are warranted in supposing, without further investigation, that the present work is worthy of its author. Special attention is called by the publishers to the fact that there is no other treatise in print, which in one volume gives a full and comprehensive treatment of the whole subject. There are one volume treatises on bills and on bills and notes, but none on commercial paper, a term which includes the consideration, not only of the subject of bills and notes but of a great deal more. The scope of this work and its thoroughness may best be seen by a succinct statement of its contents, viz: The origin and functions of commercial paper; The requisites, and component parts of bills and notes; Agreements controlling the operation of bills and notes; Persons incapacitated to become parties to commercial paper; The law of agency in its application to commercial paper; Partners as parties to commercial paper; Private corporations as parties to commercial paper; Municipal corporations as parties to commercial paper; Trustees, Guardians and personal representatives as parties: The consideration; The acceptance of bills and certification of commercial paper; The transfer of commercial paper; Transfer by indorsement; The rights of bona fide holders; Presentment for payment; Protest; Notice of dishonor; Circumstances which will excuse want of presentment, protest and notice; Payment and its effect; Forgery and alteration of commercial paper; Exchange, re-exchange and damages; The rights and liabilities of sureties and guarantors; Checks; United States Treasury notes, bills of credit and bank notes; Coupon bonds; Certificates of deposit; Bills of Lading; Sundries; Conflict of laws in relation to commercial paper.

It will be seen from this that Prof. Tiedeman has thoroughly covered the subject of which he treats. The book bears, throughout, the evidence of great labor and care in its preparation. The notes are very full and complete not only in their citations of authorities, but also in the discussions of exceptions from and qualifications of the text. We have no hesitation in commending the work to the profession, and feel sure

that it will take a high place in legal literature. The book is well printed, has an excellent table of contents and a well prepared index.

BOOKS RECEIVED.

LAWYERS' REPORTS, ANNOTATED. BOOK IV. All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Edmond H. Smith, Reporter, Burdett A Rich, Editor in chief of the United States and General Digests, and the Several Reports and Judges of each court, Assistants in Selection. (2 L. R. A.) Rochester, N. Y.: The Lawyers' Co-Operative Publishing Co. 1889.

CONSTITUTIONAL HISTORY OF THE UNITED STATES, as seen in the development of American Law. A course of lectures before the Political Science Association of the University of Michigan. By Judge T. M. Cooley, of Ann Arbor: Hon. Henry Hitchcock, of St. Louis; Hon, Geo. W. Biddle, of Philadelphia; Prof. Charles A. Kent, of Detroit; Hon. Daniel H. Chamberlain, of New York. New York and London: G. P. Putnam's Sons. The Knickerbocker Press. 1889.

NATIONAL BANK CASES, containing all decisions of the United States Supreme Court and decisions of the State courts relating to National Banks, from 1881 to 1889, with notes and references. By Irving Browne, Editor of "The Albany Law Journal," and "The American Reports." Vols. 1 and 2. San Francisco: Bancroft-Whitney Co., Law Publishers & Law Booksellers. 1889.

THE FORUM. Edited by Lorettus S. Metcalf, January, 1890. I. The Tariff and the Farmer, John G. Carlisle; II. Prehistoric Man in America, Major John W. Powell; III. The Ethics of Marriage, W. S. Lilly; IV. Woman's Place in the State, Prof. Goldwin Smith; V. Democracy in England, Henry Labouchere; VI. The Problem of Air-Navigation, Prof. R. H. Thurston; VII. Abuses of the Veto Power, F. A. Conkling; VIII. Magnetism and Hypnotism, Dr. J. M. Charcot; IX. The Wrongs of the Ute Indians, G. T. Kercheval; X. Horace Greeley's Cure for Poverty, Prof. Rodney Welch. New York: The Forum Publishing Co. 253 Fifth Ave.

QUERIES.

QUERY NO. 1.

A, having a fee simple title to land in Missouri, makes a deed to J, in which the granting clause is: "I grant, bargain and sell to J and her heirs, in fee simple." What title does J take under the above deed, there being no *habendum* clause to explain the intention of grantor? Deed to be construed under the statute of 1865. B.

QUERY NO. 2.

X owns 160 acres of land, and gives A a first mortgage on it for $500. A does not record his mortgage. X afterwards gives B a second mortgage for $500 on the land. B having actual knowledge of A's mortgage and B records his mortgage. X afterwards gives C a mortgage on same land for $500. C, of course, has notice of B's mortgage because it is recorded, but has no notice or knowledge of A's mortgage. C forcloses, property sold for $800. How is the money distributed? E. D.

QUERY NO. 3.

Article 9, § 8 of the constitution of Missouri provides that the general assembly may provide, by general law, for township organization, and when any county adopts township organization, so much of the constitution as provides for the assessment and collection of the revenue by county officers, in conflict with such general law for township organization may be dispensed with, etc. Article 10, § 11, says: For county purposes the annual rate on property shall not exceed in counties of this size fifty cents on the $100 valuation. Now the question is, after this county has adopted township organization, can the county court levy fifty cents on the $100 valuation for county purposes, and then each township come in and make a levy for township purposes and bridge funds. Cite authorities. B.

QUERY NO. 4.

Lands are sold at tax sale and deed executed to purchaser, containing redemption clause, that owner may redeem in two years by paying double taxes, double penalties and double costs. 1. When can said deed be duly recorded to convey notice? 2. When possession accompanies such deed, when does limitation begin to run: from the time of record of deed and taking of possession within the redemption period? or only when the redemption period has expired? 3. During redemption period, the purchaser having spread his deed on record and taken possession, how does he hold: under the party who has right to redeem, or adverse to him? W. H. & W.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE.—Where an accident policy is issued and accepted under conditions not contained in the body of the policy, but indorsed upon it, stipulating that the company shall not be liable for injuries resulting from certain enumerated causes, such conditions are not conditions precedent, and a *prima facie* case may be made without proving the injuries to have resulted from some other cause.—*Cronkhite v. Travelers' Ins. Co.*, Wis., 43 N. W. Rep. 731.

2. ADMIRALTY — Steam-dredge. — A steam-dredge, which is a floating scow fitted with appliances for deepening channels of navigation, is a subject of admiralty jurisdiction. — *Aitcheson v. The Endless Chain Dredge*, U. S. D. C. (Va.), 40 Fed. Rep. 253.

3. ARBITRATION AND AWARD. — The facts that one arbitrator unconsciously permits his jealousy of the other, who had often been selected as arbitrator in similar causes, to slightly warp his judgment against the selector of the other arbitrator, and that the other, from lack of independence, adjusts his judgment to balance that supposed leaning, do not vitate the result honestly reached by them. — *Silver v. Connecticut River Lumber Co.*, U. S. C. C. (Vt.), 40 Fed. Rep. 192.

4. ATTACHMENT—Damages.— The voluntary abandonment of an attachment renders the attaching creditor and surety responsible for damages for the wrongful suing out of the writ. But only such damages can be recovered as have been actually sustained when the attaching creditor acted without malice and upon probable cause, based upon reasonable grounds. — *Steinhardt v. Leman*, La., 6 South. Rep. 665.

5. ATTORNEY AND CLIENT— Authority. —Employment, by a village, of attorneys to defend an action then pending in the trial court does not authorize the attorneys to appeal from an adverse judgment. The fact that the president of the village knew that the attorneys were preparing to take an appeal does not amount to an assent thereto by the village, so as to render it liable for the attorneys' services in taking the appeal.—*Hooker v. City of Brandon*, Wis., 43 N. W. Rep. 741.

6. BILL OF EXCEPTIONS— Filing.— In Missouri, where the court has adjourned, after making an order allowing a certain time in which to file a bill of exceptions, it cannot extend the time by a similar order, at a subsequent term.—*State v. Hill*, Mo., 12 S. W. Rep. 340.

7. BOND—Indemnification.— One who executes a bond may be liable upon it, though his name do not appear in the body of it.—*Campbell v. Rotering*, Minn., 43 N. W. Rep. 795.

8. BUILDING AND LOAN ASSOCIATIONS— Shares.—Under How. St. Mich. ch. 119, relating to the incorporation of co-operative savings associations, where a member has obtained a loan from the association by a sale to it of his shares, at a discount, as provided by § 3971, such shares become liquidated, and he cannot afterwards sell or transfer them to another party.— *Michigan Bldg. & Sav. Ass'n. v. McDevitt*, Mich., 43 N. W. Rep. 760.

9. CARRIERS OF PASSENGERS — Negligence. — A passenger who remains on the platform of a car at the rear end of a long train of freight-cars, after warning to leave it, assumes the risk of injury caused by the jerk with which the train starts.—*Louisville, etc., R. Co. v. Bisch*, Ind., 22 N. E. Rep. 662.

10. CHATTEL MORTGAGES—Filing,—A chattel mortgage is to be deemed filed, under §§ 1, 8, ch. 89, Gen. St., when it is delivered to, and received and kept by, the proper officer, in his office, for the purpose of filing, notwithstanding he omits to place it with the other chattel mortgages in his office. — *Appleton Mill Co. v. Warder*, Minn., 43 N. W. Rep. 791.

11. CONDITIONAL SALES—Injunction.—Where one has contracted to furnish logs to be cut into shingles, payment to be made in notes of the purchaser, but the title to remain in the seller until the notes are paid, and the shingles have been sold by the purchaser to others, who threaten to remove them from the jurisdiction of the court, a bill by the seller to enjoin their removal, for a receiver, and to foreclose complainant's lien, which fails to allege that the defendants who threaten to remove the property, are pecuniarily irresponsible, does not show a right to equitable relief.— *Brown v. Ring*, Mich., 43 N. W. Rep. 770.

12. CONSIDERATION —Note. — Where, by the mutual agreement of debtor and creditor, a book-account is put into a note, payable at a future day, the transaction is *prima facie* evidence that the remedy upon the debt is thereby suspended until the maturity of the note, and the extension is a new and adequate consideration for the note and mortgage given to secure it.—*Lundburg v. Northwestern Elevator Co.*, Minn., 43 N. W. Rep. 685.

13. CONSTITUTIONAL LAW.—Act Tex. April 12, 1883, § 1, which leaves it discretionary with the commissioners' court to order the election of public weighers, is not unconstitutional as a delegation of legislative power, as the commissioners' court has no power to revise or amend the act in any way, it being complete as a law by legislative enactment, in accordance with constitutional forms, and the subject a matter of local regulation.—*Johnson v. Martin*, Tex., 12 S. W. Rep. 321.

14. CONTRACT—County Physician.—It is no part of the duty of a physician employed under contract by a county to treat its poor to make a *post mortem* examination of the body of a dead pauper, and when he does so at the request of the coroner he is entitled to compensation.—*Lang v. Board of Commissioners*, Ind., 22 N. E. Rep. 667.

15. CONTRACTS—Options.—A contract to sell, "in consideration of one dollar, receipt of which is acknowledged," certain railway stock at a stated price, "if taken on or before" a certain day, is void on its face under Rev. St. Ill., ch. 38, § 130, which makes void all contracts "to have or give the option to sell or buy at a future time any grain or stock of any railroad," etc. The statute makes void all contracts for the future sale of grain or railroad stock, whether such contracts are to be settled by paying differences or not. — *Schneider v. Turner*, Ill., 22 N. E. Rep. 497.

16. CRIMINAL LAW— Forged Discharge of Mortgage. — The recording of a forged discharge of a mortgage constitutes the uttering of a forged instrument as an "acquittance and discharge for money," though the note secured is still outstanding, as the discharge, if genuine, would discharge the note as well as the lien.—*People v. Swetland*, Mich., 43 N. W. Rep. 779.

17. CRIMINAL LAW—Assault with Intent to Kill.—If a party does an act with a dangerous or deadly weapon, which from its nature and the way it is done, may naturally, probably, or reasonably produce death, or jeopardize life, the law says that those who try the facts may and it is their duty to attribute to such act an intent to kill. In the light of such facts a party is not permitted to deny this intent to kill.— *Ex parte Brown*, U. S. C. C. (Ark.), 40 Fed. Rep. 81.

18. CRIMINAL LAW—Murder. — On a trial for murder, where the evidence showed that defendant had brutally and unnaturally beaten his eight-year old child in such a manner that death resulted, the court properly instructed the jury that if the child died from immoderate correction administered by the parent, and they believed from the evidence that "such immoderate correction was intentionally inflicted without just cause or excuse, and considering the manner, means, and degree of inflicting, the age and strength of the child being considered, that such a correction was evidently dangerous, and likely to kill or produce great bodily harm, the accused is guilty of murder."—*Powell v. State*, Miss., 6 South. Rep. 646.

19. CRIMINAL PRACTICE—Change of Venue.— Upon the removal of a criminal prosecution from the county in which the offense was committed to an adjoining county, upon change of venue, it is not the duty of the county attorney of the former county to follow the case to the latter county, but it is the duty of the county attorney of such adjoining county to represent the State in the prosecution of the case; and in such case, where the county attorney of the adjoining county is under the disability of having appeared in the case as counsel for the accused, it is the duty of the court to appoint an attorney to act as county attorney in the prosecution.—*Gaudy v. State*, Neb., 43 N. W. Rep. 747.

20. CRIMINAL PRACTICE—Embezzlement. — An indictment under § 905, of the Revised Statutes, is sufficient, if it sets forth, in words of similar import to those contained in the statute, the capacity in which the defendant received and possessed the money intrusted to him for delivery to another. — *State v. Washington*, La., 6 South. Rep. 633.

21. CRIMINAL PRACTICE—Homicide.— Under § 785. Rev. St., the law of manslaughter is pertinent in every trial

for murder, because the statute authorizes the jury to find a verdict of manslaughter in any trial for murder. —*State v. Brown*, La., 6 South. Rep. 670.

22. CROSS-EXAMINATION— Impeachment. — Where impeaching witnesses state, on cross-examination, the names of persons from whom they have heard reports as to the reputation of the person to be impeached, such statement, being on a collateral issue, is conclusive.—*Robbins v. Spencer*, Ind., 22 N. E. Rep. 660.

23. DEDICATION. — A municipal corporation which seeks to compel the removal of a building which has existed for many years, on the ground that it rests upon ground dedicated to public use, carries the burden of clearly proving the dedication. — *City of Shreveport v. Dronin*, La., 6 South. Rep. 656.

24. DOCUMENTARY EVIDENCE.—A document purporting to be a printed report of a congressional subcommittee, which is not authenticated does not purport to be a part of the authenticated journal, is not identified by it, and is not a record required to be kept or a publication required to be made, is not a document entitled to admission in evidence.—*Marks v. Orth*, Ind., 22 N. E. Rep. 668.

25. DOWER—Insanity.—Under Rev. St. Mo. 1879, § 2186, the widow of a lunatic is entitled to dower in lands purchased by his guardian with assets of his estate; and it is immaterial that the assets used arose from a sale of the lunatic's lands to pay debts, and the investment by the guardian was unauthorized.—*Rannells v. Isgrigg*, Mo., 12 S. W. Rep. 343.

26. DRAINAGE—Laches.—A petition for the establishment of a drain, under Rev. St. Wis. § 1365, which has been once acted on by the supervisors, cannot be used to commence new proceedings after nearly four years, though the former proceedings have been adjudged void.—*State v. Graffam*, Wis., 43 N. W. Rep 727.

27. EMINENT DOMAIN—Compensation.—The owner of a farm consisting of distinct parcels of land, separated by lands not owned by him, and over which he has no private right of way, is not entitled to have such separate parcels treated as one entire tract, for the purpose of the assessment of damages for the taking (for railroad purposes) of land in one only of such parcels.—*Cameron v. Chicago, etc. Ry. Co.*, Minn., 43 N. W. Rep. 785.

28. EXECUTION—Replevin.—Under Rev. St. Wis. § 3732, providing that a judgment defendant cannot maintain an action for the recovery of property seized on execution against him, unless the property be exempt by law from seizure, a nonsuit is properly granted in replevin by such defendant for property so seized, where the proof fails to show the property to be exempt.—*Hesse v. Hargraves*, Wis., 43 N. W. Rep. 736.

29. FALSE IMPRISONMENT.—In an action for false imprisonment it appeared that the plaintiff had been arrested for an assault, and taken before a magistrate, who was at the time engaged in the trial of another cause. The defendant, an assistant clerk of the court, directed that he be confined in an adjoining room, set apart for prisoners, for a few minutes, until the complaint was prepared, when he was admitted to bail. *Held*, that plaintiff had no cause of action.—*Hopner v. McGowan*, N. Y., 22 N. E. Rep. 558.

30. FALSE REPRESENTATIONS.—*Held:* that the representations complained of were expressions of opinion as to matters equally in the power of both parties to ascertain, and the omission of any reference to them in the contract showed that plaintiffs did not regard the same as material; and plaintiffs' continuance of the work after discovering that such representations were false was a waiver of their right to contest the contract upon that ground.—*Nounnan v. Sutter County Land Co.* Cal., 22 Pac. Rep. 515.

31. FRAUDS—Statutes of.—Plaintiff, an old man, owned a lot of ground, and entered into a verbal agreement with defendant that if the latter would erect a house on the ground, pay half the taxes, etc., and take care of plaintiff, he might occupy said house during the natural life of plaintiff. Defendant complied with the terms of the agreement. *Held*: that part performance of the contract by defendant took the verbal agreement out of the statute of frauds, and defendant acquired a life-estate in the property.—*Manning v. Franklin*, Cal., 22 Pac. Rep. 550.

32. FRAUDULENT CONVEYANCES—Posseession.—Where a judgment debtor conveys land to his wife and children for a recited consideration, a part of which is paid, and the vendees are in actual possession for seven years such possession is presumed to be with the legal title, and the conveyance cannot be attacked for fraud.—*Welcker v. Staples*, Tenn., 12 S. W. Rep. 340.

33. FRAUDULENT CONVEYANCES.—Where a petition alleges that one of the defendants bought certain real estate, and had the same conveyed to his wife for the purpose of defrauding his creditors, and the evidence shows that the land was purchased by such defendant's father, who conveyed it to his wife the plaintiff, who had purchased the land under a judgment against such defendant, is not entitled to a decree avoiding the conveyance, though the money paid for the land may have been the proceeds of defendant's labor.—*Reed v. Bott*, Mo., 12 S. W. Rep. 347.

34. GARNISHMENT—Exemption of Wages.—A "laboring man or woman," within subdivision 11, § 310, ch. 66, Gen. St., exempting wages, means only those whose work is manual. An agent who sells goods by sample is not within its meaning. — *Wildner v. Ferguson*, Minn., 43 N. W. Rep. 794.

35. GARNISHMENT — Costs of Garnishee — Attorney's Fees.—Under Code Miss. § 2448, one summoned as garnishee cannot recover expenses incurred by way of attorney's fees after he has put in an answer, and which are necessitated by having to defend an issue taken upon such answer.— *Bernheim v. Brogan*, Miss., 6 South. Rep. 649.

36. GUARDIAN—Illegitimate Child.— In the absence of statutory authority, the father of a natural child cannot appoint its testamentary guardian, but the wishes of the father, as expressed in his will, may be considered by the court in making the appointment. — *Ramsay v. Thompson*, Md., 18 Atl. Rep. 592.

37. HIGHWAYS — Abandonment. — Under a claim of abandonment of a road in a municipal corporation, if non-user of such road may work an abandonment of it, the non-user must be shown to have extended over a period of 21 years.—*Kelly Nail & Iron Co. v. Lawrence Furnace Co.*, Ohio, 22 N. E. Rep. 639.

38. HOMESTEAD—Mortgage— Abandonment. — Under Code Civil Cal. §§ 1242, 1244, a mortgage of a homestead executed by the husband alone is void from its inception, and it is of no avail that the homestead is afterwards abandoned.— *Gleason v. Spray*, Cal., 22 Pac. Rep. 551.

39. INSURANCE— Condition — Waiver. — If the local agent of an insurance company, on being requested by the owner of insured property to notify the company of the loss, which occurred the night before the request, informs the owner that he has already sent notice, which is true, and the notice is received in due course of mail, a requirement of the policy that the insured shall give immediate notice of loss is sufficiently complied with, though the notice did not purport to be given on behalf of the insured. — *Loeb v. American Cent. Ins. Co.*, Mo., 12 S. W. Rep. 374.

40. INSURANCE—Premiums.— Though the policy provided that, while the insurer should be relieved from liability on default, the assured should remain liable on the notes given for quarterly premiums, it was not unreasonable nor against public policy, nor prohibited by statute.—*St. Paul F. & M. Ins. Co. v. Coleman*, Dak., 43 N. W. Rep. 693.

41. INSURANCE—Warranty. — While statements in the application as to the condition of the house constituted a warranty, and not merely a representation, of their truthfulness, such being expressly provided by the policy, the warranty was not absolute, but was qualified by the words of the application, "material to the

risk;" and that, unless the promise to build a chimney was material, a breach of it would not avoid the policy. —*Waterbury v. Dakota Fire Ins. Co.*, Dak., 43 N. W. Rep. 697.

42. INSURANCE — Transfer of Title. — An insurance policy for the benefit of husband and wife jointly on property of the husband provided that any change in the title, unless with consent of the company at the home office, should vitate the policy: *Held*, that a transfer from the husband to his wife through a third person vitated the policy, and that evidence was not admissible, in an action on the policy, that when it was issued the local agent who solicited the policy was informed of the proposed transfer, and orally agreed thereto.—*Walton v. Agricultural Ins. Co.*, N. Y., 22 N. E. Rep. 443.

43. INTOXICATING LIQUORS.— The Dakota law of 1879, prescribing penalties for the sale of liquor without a license, continues to prevail, notwithstanding the adoption and subsequent repeal of a "local option law" by a county, and recitals of a local option law in an indictment found after its repeal are surplusage.—*Territory v. Pratt*, Dak., 43 N. W. Rep. 711.

44. JUDGMENT BY CONFESSION.— Where a judgment is pronounced by the court in open session, it takes effect from the time it is so rendered, though the act of entering the same in the record may be delayed; but a judgment by confession takes effect from the time it is actually entered in the record, as provided by the statute.—*Schuster v. Rader*, Colo., 22 Pac. Rep. 505.

45. JUDGMENT OBTAINED BY PERJURY. — Under § 285, ch. 66 Gen. St. 1878, providing an action to set aside a judgment obtained by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action cannot be maintained upon the bare allegation that on an issue of fact squarely made, so that each party knows what the other will attempt to prove, and where neither has a right, or is under any necessity, to depend on the other to prove the fact to be as he himself claims it, there was false or perjured testimony by the successful party or his witness. — *Hass v. Billings*, Minn., 43 N. W. Rep. 797.

46. JUSTICE OF THE PEACE — Execution. — As Mansf. Dig. Ark. § 4103, expressly prohibits the issue of execution on the judgment of a justice of the peace after five years from the date of its rendition, the power to issue it cannot be revived by *scire facias*, or other proceeding peculiar to courts of superior jurisdiction.—*Trammell v. Anderson*, Ark., 12 S. W. Rep. 328.

47. LANDLOD AND TENANT.—In Michigan, where a tenant holds over the second year under a verbal lease, the landlord may have restitution of the premises at the end of the second year without formal notice to quit.—*Teft v. Hinchman*, Mich., 43 N. W. Rep 680.

48. LIMITATION OF ACTIONS. — Where a railway company constructs its road-bed so that at times it causes the overflow of adjoining lands, there may be as many recoveries as there are successive injuries, and the statute of limitations begins to run on the happening of the injury complained of, and not from the construction of the railway.—*St. Louis, etc. Ry. Co. v. Biggs*, Ark., 12 S. W. Rep. 331.

49. LIMITATION OF ACTIONS.—In computing the period of limitation under Pub. St. Mass. ch. 197, § 1, requiring certain actions to be commenced "within six years next after the cause of action accrues," in an action on a demand note the day of its date to be excluded.—*Seward v. Heyden*, Mass., 22 N. E. Rep. 629.

50. MANDAMUS—State Auditor.—Under Rev. St. Ill. 1889, ch. 113, § 41, *mandamus* will not lie to compel the auditor to draw his warrant for the balance due to the credit of void county bonds, where there are outstanding valid bonds of such county to which the balance in the treasury may legally be applied, and the proportion of such balance that belongs to the void bonds has not been ascertained.—*Swigert v. Hamilton County*, Ill., 22 N. E. Rep. 609.

51. MARRIED WOMEN.— Under Gen. St. S. C. § 2037, providing that a married woman may "contract and be contracted with, as to her separate property, in the same manner as if she were unmarried," she may give a note for money borrowed for her own use. — *Howard v. Kitchens*, S. Car., 10 S. E. Rep. 224.

52. MECHANICS' LIENS. — Code Civil Proc. Cal. § 1183, requires the construction contract to be in writing, and declares that where the amount exceeds $1,000, unless it is filed in the recorder's office of the county where the property is situated, it shall be void; "and in such case the labor done and materials furnished by all persons aforesaid shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof:" *Held*, that as the contract is void when not recorded, the material-men are not limited in their right to a lien to the amount due the contractor on the contract, though they had actual notice that there was such a contract.—*Kellogg v. Howes*, Cal., 22 Pac. Rep. 509.

53. MONEY PAID — Illegal Tax. — A county treasurer may be sued personally for money paid to him in his official capacity for illegal taxes, where it is paid under protest, with notice that suit will be brought to recover it.—*Rushton v. Burke*, Dak., 43 N. W. Rep. 815.

54. MORTGAGES— Defenses. — Defendant gave a mortgage for the purpose of preventing the collection of a deficiency in a foreclosure suit of a mortgage on certain other property, and the mortgagee assigned the same to plaintiff, who sought to foreclose: *Held*, that defendant was not estopped from pleading want of consideration.—*Hill v. Hoole*, N. Y., 22 N. E. Rep. 547.

55. MORTGAGES — Collateral Notes. — A promissory note secured by an act of mortgage, executed and issued only for use as collateral security for a presently existing debt, payable at a future date, to the maker's own order, and by him indorsed, passes, before maturity, free of all equities and offsets in the maker's favor. —*Levy v. Ford*, La., 6 South. Rep. 671.

56. MUNICIPAL CORPORATIONS. — All the preliminary steps, provided for by a city charter, for the improvement of streets, are essential to the validity of the improvement and if either is omitted, the tax levy for such improvement is void. — *McLamen v. City of Grand Forks*, Dak., 43 N. W. Rep. 710.

57. MUNICIPAL CORPORATION— License—Gas Company. —A town ordinance authorizing a gas company, on condition of its furnishing gas at specified rates, to lay pipes in the streets, is, after it has been accepted by the gas company, a contract, and not a revocable license.—*Chicago Municipal Gas-light Co. v. Town of Lake*, Ill., 22 N. E. Rep. 616.

58. NEGLIGENCE—Railroad Tracks. — A sane man who drives a team upon a railroad track at a road crossing at night, and continues driving thereon for nearly two miles, where there is nothing to prevent his leaving the track except darkness, is guilty of gross negligence, and no recovery can be had for his death caused by a passing train, though the railroad company maintained the crossing in a negligent manner, and decedent was not negligent in entering on the track. — *McDonald v. Chicago, etc. Ry. Co.*, Wis., 43 N. W. Rep. 744.

59. NEGLIGENCE OF LANDLORD.— *Held*, that there was nothing to show negligence on part of defendant where plaintiff was injured falling down a flight of steps leading from the sidewalk to cellar of building owned by defendant.—*Wasson v. Pettit*, N. Y., 22 N. E. Rep. 566.

60. NEW TRIAL—Newly-discovered Evidence.—Newly-discovered testimony, for the purpose of impeaching a witness who had testified on the trial, is insufficient to justify the allowance of a new trial. — *State v. Burt*, La., 6 South. Rep. 631.

61. PARTIES — Action by Agent. — Under Code Civil Proc. Dak. § 74, a general agent of a mining company who deposited money with a bank in his own name as "agent," subject to his check, and whose drafts and checks, so drawn, were honored by the bank, could sue

he bank in his own name for a balance alleged to be due on account. — *McLaughlin v. First Nat. Bank*, Dak., 43 N. W. Rep. 715.

62. PARTNERSHIP — Note. — After an assignment for benefit of creditors by a firm, one member, in the presence of the others, executed a note in the name of the firm, the proceeds of which were paid to the firm's assignee, with the knowledge and consent of all partners, and used to procure the release of property of the firm which would otherwise have been applied in payment of the firm debts: *Held*, that the note was that of the firm, which was liable therefor. — *Williston v. Camp*, Mont., 22 Pac. Rep. 502.

63. POSSESSION — Personalty. — Cattle running on a range, which is common pasturage for everybody, are in the actual possession of no one, and the constructive possession accompanies the title. — *Budd v. Power*, Mont., 22 Pac. Rep. 499.

64. PRINCIPAL AND AGENT. — Where an agent for the sale of land, with the knowledge and consent of his principal, employs another to show the property to a purchaser, and the latter agent fraudulently directs a third person having no knowledge of the fraud to show the wrong land, the principal is liable to the purchaser for the consideration paid. — *McKinnon v. Vollmar*, Wis., 43 N. W. Rep 800.

65. PUBLIC LAND—Administrator's Sale— The head of a family made entry upon public land, and died before final proof. After her death her administrator advanced the money and paid the government for the land, and obtained a patent to it for her heirs. Subsequently he obtained an order from the probate court to sell the land to repay him: *Held*, the money so advanced was not a lien upon the land; and further held that no title thereto passed by a sale under such order. — *Coulson v. Wing*, Kan., 22 Pac. Rep. 570.

66. QUO WARRANTO—Corporations. — Proceedings in the nature of *quo warranto*, when instituted for the purpose of restraining a corporation from an unlawful exercise of franchises, must be against the corporation, and not merely against its officers and agents.— *State v. Somerby* Minn., 43 N. W. Rep. 689.

67. RAILROAD COMPANIES—Stock killing.—The extent of the duty of a railroad company as to stock on its track is that the engineer shall use reasonably care, after the stock is discovered by him, to prevent injury to it, and it is error to charge that it is negligence for a railroad company to fail to keep a lookout for stock.— *Memphis & L Ry. Co., v. Kerr* Ark., 12 S. W. Rep. 329.

68. RESCISSION—Vendor and Vendee.—When a sale is rescinded or annulled for non-payment of the purchase price, by agreement between the original parties, whatever its validity may be as to them, the retrocession does not necessarily affect third persons.—*Payne v. Nowell*, La., 6 South Rep. 636.

69. REFERENCE.—Under Code Civil Proc. N. Y. § 1013, it is not enough to justify a compulsory reference that the case may possibly involve the examination of a long account, but such fact must affirmatively appear.— *Thayer v. McNaughton*, N. Y., 22 N. E. Rep 562.

70. REMOVAL OF CAUSES. — Defendants demurred to plaintiffs' complaints in the State court. The demurrers were heard and sustained in the State court, and plaintiffs were given leave and time to file amended complaints, which they filed. To plaintiffs' amended complaints defendants demurred, and at the same time filed their petitions and bonds for removal of the cases to this court: *Held*, that the petitions and bonds were not filed within the statutory time.—*Delbanco v. Singletary*, U. S. C. C. (Nev.,) 40 Fed. Rep. 177.

71. SCHOOL DISTRICT — Construction or Statutes.— Public school property, real or personal, that has been appropriated and set apart by a township board of education for the purpose of a public school of a higher grade than primary, for the benefit of the youth of the whole township, does not pass to or vest in the board of education of a separate school-district that may be afterwards organized out of the territory within which the property happens to be situated, although the property falls within the letter of section 3972, Rev. St.— *Board of Education v. Board of Education*, Ohio, 22 N. E. Rep. 641.

72. SHERIFF—Limitation.—A proceeding to amerce a sheriff under section 472 of the Civil Code, for a penalty on account of the omission of official duty, is barred by failure to prosecute within one year.—*Fuller v. Wells, Fargo & Co.*, Kan., 22 Pac. Rep. 561.

73. SPECIFIC PERFORMANCE—Oral Lease.—Where tenants under a written lease make an oral agreement with their landlord for a five-years' lease to begin at the end of their present term, and on the faith of such agreement make valuable permanent improvements, and retain possession after the determination of their written lease, such improvements and possession are sufficient part performance of the oral agreement to take it out of the statute of frauds, and warrant a decree for specific performance.— *Morrison v. Herrick* Ill., 22 N. E. Rep 537.

74. SPECIFIC PERFORMANCE.—A parol contract by a father to convey land to his daughter upon consideration of her living upon and improving the land will not be specifically enforced after the father's death, where the evidence as to the making of the contract is conflicting, and it appears that the daughter, after her father's death, offered to buy the land from the other heirs.—*Shaw v. Schoonover*, Ill., 22 N. E. Rep. 589.

75. SPECIFIC PERFORMANCE—Homstead.—Rev. St. Ill. ch. 52, §§ 1 and 4, do not preventa decree for the specific enforcement of a contract for the sale of property occupied as a homestead, though the contract is not signed by the wife where the property is worth $50,000, and the vendee agrees to accept title subject to the vendor's homestead rights.—*Watson v. Doyle*, Ill., 22 N. E. Rep. 613.

76. TAX COLLECTOR—Bond.—The renewal of a warrant for the collection of taxes, extending it beyond the time originally fixed for its return, will not release the sureties on the official bond of the collector.—*Village of Olean v. King*, N. Y., 22 N. E. Rep. 559.

77. TAX-TITLES.—Under Rev. St. Wis. § 1182, the right to a tax-deed is barred by the expiration of six years from the date of the entry of such assignment upon the records of the county, such record showing conclusively, for the purpose of the statute, that title to the certificates passed out of the county upon that date.— *Hiles v. Cate*, Wis. 43 N. W. Rep. 802.

78. TRUSTEE—Trust Funds.—A trustee, who, without directions as to the mode of investing trust fouds, loans them to a private manufacturing corporation on mere personal security, is liable for any loss occasioned thereby, though he acts in good faith.—*Simmons v. Oliver*. Wis., 43 N. W. Rep. 561.

79. VENDOR AND VENDEE.—Where a vendor conveys land, reserving in the deed a lien for the price, and retaining possession, failure to pay the debt at maturity does not forfeit the grantee's rights, and give the vendor a right to rescind.—*Stitzle v. Evans*, Tex., 12 S. W. Rep. 326.

80. WILL — Probate. — Under Rev. St. Ill. ch. 148, § 2, which makes it a prerequisite to the probate of a will that two of the witnesses shall testify that the testator either signed or acknowledged the will in their presence, a will may be admitted to probate when one subscribing witness swears that the testator acknowledged the will in his presence, and the other identifies his signature, says that he does not recollect who was present when he attested the will, but that the testator, "or some one for him," asked him to attest it.—*Canatsey v. Canatsey*, Ill., 22 N. E. Rep. 595.

81. WITNESS—Impeachment.—Pub. St. Mass. ch. 169, § 19, which provides that the conviction for a crime may be shown to affect the credibility of a witness, does not require the crime to be of such a nature as of itself to affect his credibility, and evidence of a conviction for assault is admissible for purposes of impeachment.— *Quigley v. Turner*, Mass., 22 N. E Rep. 586.